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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 AGRICOLA BAJA BEST, S. De. R.L.
11 de C.V.,

12 Plaintiff,

13 vs.

14 HARRIS MORAN SEED
15 COMPANY,

16 Defendant.

CASE NO. 11cv2482 - IEG (JMA)

**ORDER DENYING PLAINTIFF'S
MOTION FOR LEAVE TO AMEND**

[Doc. No. 40]

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18 Before the Court is Plaintiff Agricola Baja Best, S. De. R.L. de C.V.'s motion
19 for leave to amend. [Doc. No. 40.] For the reasons below, the Court **DENIES**
20 Plaintiff's motion.

21 **BACKGROUND**

22 This case arises from the loss of a commercial tomato crop. Plaintiff is a
23 commercial grower with tomato fields located in an area populated by thrips, small
24 winged insects which spread the Tomato Spotted Wilt Virus ("TSWV"). [Doc. No.
25 11 at ¶ 11.] Plaintiff purchased purportedly TSWV-resistant tomato seeds from
26 Defendant Harris Moran Seed Company on or about November 24, 2010, and
27 contends that plants grown from those seeds were damaged by TSWV, diminishing
28 yield and profit. [See *id.* at ¶¶ 10, 19, 20.]

Plaintiff commenced suit on October 26, 2011, and filed the operative First

1 Amended Complaint on March 7, 2012, alleging breach of contract, breach of
2 express warranty, breach of implied warranty of merchantability, breach of implied
3 warranty of fitness for a particular purpose, products liability, negligence, negligent
4 misrepresentation, and fraud. [See Doc. No. 11.] On September 13, 2012, the Court
5 entered a scheduling order holding, *inter alia*, that “[a]ny motion . . . to amend the
6 pleadings . . . shall be filed on or before **December 3, 2012.**” [Doc. No. 21 at 1.
7 (emphasis in original).] The parties moved for and received several discovery
8 deadline extensions. [See Doc. Nos. 27, 29, 36, 38.] In its May 2, 2013 motion to
9 extend, Plaintiff expressed intent to seek leave to file a Second Amended Complaint
10 (“SAC”) within two weeks. [Doc. No. 36 at 2,3.] Both its own self-imposed two
11 week deadline and the December 3, 2012 scheduling order deadline passed without
12 Plaintiff filing a motion to amend or seeking a further extension. Nor did Plaintiff’s
13 counsel express continued intent to amend during any subsequent communications
14 with defense counsel. [See Doc. 43-4 at ¶ 17.] Only with the present motion, filed
15 over six months past the scheduling order deadline, does Plaintiff seek leave to file
16 an SAC alleging new legal theories relating to the rate of germination and level of
17 disease resistance of the seeds. [Doc. No. 40 at 2-3.]

18 **DISCUSSION**

19 Under Federal Rule of Civil Procedure 16(b), a movant seeking leave to
20 amend after an expired scheduling order deadline bears the burden of “show[ing]
21 good cause for not having amended their complaints before the time specified in the
22 scheduling order expired.” *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th
23 Cir. 2000); *see also Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-608
24 (9th Cir. 1992) (“Once the district court ha[s] filed a pretrial scheduling order
25 pursuant to Federal Rule of Civil Procedure 16 which established a timetable for
26 amending pleadings that rule’s standards control[.]”).

27 “Unlike Rule 15(a)’s liberal amendment policy which focuses on the bad faith
28 of the party seeking . . . amendment and the prejudice to the opposing party, Rule

1 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking
2 the amendment." *Johnson*, 975 F.2d at 609; *see also Onyx Pharm., Inc. v. Bayer*
3 *Corp.*, 2011 WL 4527402, at *2 (N.D. Cal. Sept. 21, 2011) (the "moving party must
4 show reasonable diligence."). "To show the requisite diligence, the party seeking
5 amendment must establish both that her noncompliance with a Rule 16 deadline
6 occurred because of the development of matters which could not have been
7 reasonably foreseen or anticipated and that she was diligent in seeking amendment
8 of the Rule 16 order once it became apparent that she could not comply." *Life*
9 *Technologies Corp. v. Ebioscience, Inc.*, 2012 WL 3628624, at *3 (S.D. Cal. Aug.
10 21, 2012) (internal quotation omitted); *accord Harris v. Vector Marketing Corp.*,
11 2010 WL 3743532, at *2 (N.D. Cal. Sept. 17, 2010) (a party that "has failed to
12 explain why [it] did not move [] earlier," "has failed to satisfy the Rule 16(b) good
13 cause standard.").

14 The record here does not reflect reasonable diligence and therefore Plaintiff
15 fails to establish good cause. Plaintiff received the alleged representations in regard
16 to and informed Defendant of the germination issue well before the inception of this
17 lawsuit, *i.e.*, years before the scheduling order's deadline. [*See, e.g.*, Doc. No. 44 at
18 4; Doc. No. 40 at 3.] Thus, Plaintiff knew, or should have known, of the facts
19 underlying the proposed amendments well before the scheduling order deadline to
20 amend. The only purportedly new development since the deadline passed is a
21 determination that long-known, underlying facts support additional legal theories.
22 [Doc. No. 44 at 7 ("Plaintiff's experts have opined that the germination rate issue is
23 basis [sic] for damages.").] Counsel's delayed comprehension of legal theories
24 readily available from the outset of the lawsuit does not establish reasonable
25 diligence. Rather, in light of the record, it reflects carelessness: Plaintiff failed to
26 timely pursue cognizable legal theories, failed to meet the Court-imposed deadline to
27 amend, failed to meet its own self-imposed deadline to move for leave to amend, and
28 failed to notify either the Court or opposing counsel of its continued intent to pursue


1 leave to amend after missing these deadlines. This record of “carelessness is not
2 compatible with a finding of diligence and offers no reason for a grant of relief.”
3 *Johnson*, 975 F.2d at 607-08. Given Plaintiff’s failure to establish reasonable
4 diligence, leave to amend is **DENIED**. See *Zivkovic v. Southern California Edison*
5 *Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (“If the party seeking modification ‘was
6 not diligent, the inquiry should end’ and the motion to modify should not be
7 granted.”) (quoting *Johnson*, 975 F.2d at 609); *Life Technologies*, 2012 WL
8 3628624, at *3 (“failure to establish reasonable diligence alone warrants denial.”).

9 **CONCLUSION**

10 For the foregoing reasons, Plaintiffs’ motion is **DENIED**.

11 **IT IS SO ORDERED.**

12 **DATED:** August 20, 2013

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14 **IRMA E. GONZALEZ**
15 **United States District Judge**
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